

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:

Richard Alan Schmiel
and Lynn Marie Schmiel,

Debtors. /
Stuart A. Gold, Trustee,

Case No. 03-66533-PJS
Chapter 7
Hon. Phillip J. Shefferly

Plaintiff,

v.

Adv. Pro. No. 04-4023

Interstate Financial Corporation,

Defendant. /

**OPINION DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. Background

The Trustee in this chapter 7 case filed an adversary complaint to avoid a mortgage given by the Debtors to Defendant Interstate Financial Corp. ("Interstate") as a preferential transfer under 11 U.S.C. § 547(b). This case was before the Court previously on Interstate's first motion for summary judgment, based solely on the "earmarking" doctrine. The Court issued an opinion ("Opinion") on January 20, 2005, denying Interstate's motion and specifically leaving open the merits of a second defense raised by Interstate which related to when its mortgage should be considered recorded under Michigan law. See Gold v. Interstate Financial Corp., 319 B.R. 520, 525 n.3 (Bankr. E.D. Mich. 2005) (expressly stating that its decision was "without prejudice to Interstate's argument that the mortgage shall be 'deemed recorded' upon presentation to the Register of Deeds"). The date of recording is essential to determining when a transfer of an

interest of the Debtors' property took place, which in turn will determine whether the transfer was in the ninety-day preferential transfer period under § 547(b)(4)(A) and also whether it was within the safe harbor provision under § 547(e)(2). Both parties have filed motions for summary judgment, arguing that there are no genuine issues of material fact and judgment should be entered in their favor. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(F) and (K).

The following facts, most of which were set forth in the Opinion, are not in dispute. On April 25, 2003, the Debtors refinanced the mortgage on their residence located at 1073 Truwood, Rochester Hills, Michigan by obtaining a mortgage loan from Interstate. A prior mortgage on the property was held by Wells Fargo Home Mortgage, Inc. ("Wells Fargo"). The Debtors granted the new mortgage to Interstate on April 25, 2003, to secure the payment of \$151,945. Wilson Title Company handled the mortgage closing for Interstate. On April 30, 2003, Craig Helmer, an employee of Wilson Title, dropped the mortgage in a "bin" at the Oakland County Register of Deeds office, along with four other unrelated instruments. On June 17, 2003, Helmer on behalf of Wilson Title, wrote check number 3632 for \$169.00, which included the fee for recording the mortgage. Helmer tendered the check to the Register of Deeds on July 30, 2003. The Register of Deeds stamped the mortgage with a liber and page number on July 30, 2003, ninety-six days after the April 25, 2003 closing. The Debtors filed their chapter 7 petition on September 26, 2003.

II. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) for summary judgment is incorporated into Federal Rule of Bankruptcy Procedure 7056(c). Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” Anderson, 477 U.S. at 247-48. A “genuine” issue is one where no reasonable fact-finder could return a judgment in favor of the non-moving party. Berryman v. Reiger, 150 F.2d 561, 566 (6th Cir. 1998) (citing Anderson, 447 U.S. at 248).

III. Analysis

Although the Trustee must prove each of the elements under § 547(b), the parties’ cross-motions only addressed the timing of the transfer to Interstate under § 547(b)(4): “[T]he trustee may avoid any transfer of an interest of the debtor in property . . . made [] on or within 90 days before the date of the filing of the petition” 11 U.S.C. § 547(b)(4)(A). The timing of a preferential transfer is determined by application of § 547(e)(2). That section of the Bankruptcy Code looks to the date of perfection to determine the time the transfer took place. A transfer occurs

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

11 U.S.C. § 547(e)(2).

Section 547(e)(1)(A) addresses when perfection occurs with respect to real property:

[A] transfer of real property other than fixtures, but including the interest of a

seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee

11 U.S.C. § 547(e)(1)(A).

In Michigan, perfection occurs upon recording. See Mich. Comp. Laws Ann. § 565.29 (West 1988) (“Every conveyance of real estate within the state . . . which shall not be recorded . . . shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.”). Accordingly, for purposes of § 547(b), a transfer of a mortgage interest in real property occurs upon perfection which, in Michigan, is when the mortgage is recorded. If the mortgage is recorded, and therefore perfected, within ten days of a debtor granting the mortgage, the time of the transfer relates back to the date the debtor granted the mortgage. 11 U.S.C. § 547(e)(A). On the other hand, if the mortgage is not recorded, and therefore not perfected, within ten days of a debtor granting the mortgage, the time of the transfer does not relate back to the date the debtor granted the mortgage, but instead occurs either on the date of perfection, 11 U.S.C. § 547(e)(2)(B), or on the date of filing the bankruptcy petition if the mortgage still has not been perfected by the commencement of the case, 11 U.S.C. § 547(e)(2)(C).

Because perfection occurs in Michigan when a mortgage is recorded, the issue in this case is simply when was Interstate’s mortgage recorded. Interstate’s position is that the mortgage was recorded when Helmer delivered it to the Register of Deeds on April 30, 2003, five days after the Debtors granted the mortgage to Interstate. According to Interstate, because the recording of the mortgage, and thus perfection, occurred within ten days of when the transfer took effect between the Debtors and Interstate, the time of the transfer relates back to April 25, 2003 under

§ 547(e)(2)(A) and is therefore not within the ninety day preference period under § 547(b)(4).

On the other hand, the Trustee's position is that the mortgage was not recorded when it was delivered to the Register of Deeds on April 30, 2003, but instead was recorded on July 30, 2003, when it was stamped with a liber and page number, which was outside the ten-day safe harbor period of § 547(e)(2)(A). The Trustee argues that the recording of the mortgage, and thus perfection, occurred three months after the Debtors granted Interstate the mortgage. The Trustee contends that the timing of the transfer is therefore fixed by § 547(e)(2)(B), so there is no relation back to the date the Debtors granted the mortgage. The Trustee concludes that recording, and therefore perfection, occurred on July 30, 2003, which places the date of the transfer within § 547(b)(4)(A)'s ninety-day period and thus subject to avoidance as a preferential transfer.

Resolution of this issue requires examination of the Michigan recording statute.

Michigan registers of deeds are required to maintain an entry book of mortgages. Mich. Comp. Laws Ann. § 565.24 ("Every register of deeds shall keep an entry book of deeds and an entry book of mortgages . . .").

In the entry book of mortgages the register shall enter all mortgages and other deeds intended as securities, and all assignments of any mortgages or securities . . . noting in the books, the day, hour, and minute of receipt, and other particulars, in the appropriate columns in the order in which the instruments are respectively received.

Mich. Comp. Laws Ann. § 565.25(1). Every register of deeds must also maintain a second set of books, the record books. Any mortgages entered in the entry book of mortgages "shall be recorded at full length, with the certificates of acknowledgment . . ." Id. § 565.26. The "certificate of acknowledgment" is explained in § 565.27: "The register shall certify upon every instrument recorded by him, the time it was received, and a reference to the book and page where

it is recorded.” Id. § 565.27. The payment of a recording fee is also required.

A register of deeds, upon the payment of the proper fee, shall record or cause to be recorded, at length, upon the pages of the proper record books in his or her office . . . instruments or writings authorized by law to be recorded in his or her office, and left with him or her for that purpose.

Id. § 565.491 (emphasis added). The fee must be paid “when the mortgage is left for record.” Id. § 600.2567(1)(a).

In order to be recorded, an instrument must be “received for record” by the register of deeds. Id. § 565.201. No instrument “shall be received for record by the register of deeds . . . unless that instrument complies with each of the [] requirements” outlined in § 565.201. In other words, a register of deeds is barred by statute from “receiving for record” any instrument that does not conform with the numerous and specific requirements of § 565.201. Upon determining that such requirements are met, the register of deeds is obligated to enter the instrument into the entry book under § 565.24. The effect of the register of deeds having entered the instrument in the entry book is that

[t]he instrument shall be considered as recorded at the time so noted and shall be notice to all persons . . . of the liens, rights, and interests acquired by or involved in the proceedings. All subsequent owners or encumbrances shall take subject to the perfected liens, rights or interests.

Mich. Comp. Laws Ann. § 565.25(4). Accordingly, under the Michigan statute, recording, and therefore perfection, occurs upon entry by the Register of Deeds into the entry book, not the record book. What then, does the entry book show with respect to Interstate’s mortgage?

In this case, Helmer stated in his affidavit that he delivered the mortgage to the Oakland County Register of Deeds on April 30, 2003. A check from Wilson Title for the recording fee was written on June 17, 2003. The check was tendered to the Register of Deeds on July 30,

2003.¹ The Register of Deeds stamped the mortgage with a liber and page number on July 30, 2003. Neither Interstate nor the Trustee provided the Court with any affidavits to show whether the Register of Deeds found the mortgage to be in compliance with § 565.201 on April 30, 2003, such that the Register of Deeds could receive the mortgage for record on that date, or whether the Register of Deeds entered the mortgage in the entry book on April 30, 2003 under Mich. Comp. Laws Ann. § 565.25(1) so that it was considered as recorded and perfected on that date against subsequent owners or encumbrances under § 565.25(4).

Interstate argues that it was enough just to present or deliver the mortgage on April 30, 2003. According to Interstate, the Register of Deeds “received” the mortgage when Helmer delivered it on April 30, 2003, and thus the Register of Deeds was obligated to enter it into the entry book of mortgages at that time. According to Interstate, if the Register of Deeds failed to enter it at that time, that should not prejudice Interstate by delaying the date of recording. For support, Interstate relies on Central Ceiling v. Department of Commerce, 642 N.W.2d 397 (Mich. Ct. App. 2002), *aff’d* 683 N.W.2d 142 (table) (Mich. 2004). In Central Ceiling, a general contractor failed to pay its subcontractors for materials and labor. 642 N.W.2d at 399. The subcontractors sought recovery from a fund administered by the Michigan Department of Commerce under the Construction Lien Act, which requires that subcontractors present claims of lien within ninety days of last furnishing labor or materials. Id. The subcontractors each presented claims of lien to the Wayne County Register of Deeds within the statutory ninety days.

¹ The Trustee asserted that Wilson Title delivered the check on July 30, 2003. Interstate did not take issue with the Trustee’s contention, stating in its response to the Trustee’s motion that “[t]he uncontroverted evidence demonstrates that Interstate paid the recording fee on July 30, 2003, when Craig Helmer presented a check payable to the Register of Deeds.” Interstate did not explain why the check was dated June 17, 2003.

However, the register of deeds did not record the liens until after the ninety-day period has passed. Id.

The subcontractors relied on Construction Lien Act's "substantial compliance" provision:

"This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them."

Id. at 400 (quoting Mich. Comp. Laws Ann. § 570.1302(1)). The Michigan Court of Appeals agreed with the subcontractors and ruled that "the subcontractors' actions of properly filing the lien claims with the register of deeds, and acceptance by the register of deeds office, constitutes substantial compliance with the act's requirement that a claim of lien be recorded within ninety-days." Central Ceiling, 642 N.W.2d at 400. The court of appeals stressed that the "holding leaves no uncertainty that the filing and acceptance must occur within the ninety-day period" and distinguished a case where "a lien may be improperly filed and thus not accepted, in which case the requirement may not be met." Id. at 401 (discussing Northern Concrete Pipe, Inc. v. Sinacola Companies-Midwest, Inc., 603 N.W.2d 257 (Mich. 1999)).

In a strong dissent, Judge Wilder argued that the majority's conclusion that the filing and acceptance of the liens within the ninety-day period substantially complies with the Construction Lien Act's requirement that the lien be recorded within that time frame "defeats the purpose of the requirement and is inconsistent with the plain meaning of the term 'recorded.'" Central Ceiling, 642 N.W.2d at 404 (Wilder, J., dissenting). Judge Wilder then reviewed the recording statutes in Michigan and concluded that "as both M.C.L. § 565.25 and M.C.L. § 600.2567 make clear, the leaving of an instrument with the register of deeds, i.e., filing, *does not* constitute the

recording of the document. Id. (citations omitted) (emphasis in original).

In sum, Judge Wilder argued that “recording” can only mean “entry in the book” and rejected the argument that the failure of a register of deeds to timely make such entry should lead to a different interpretation of the recording statute.

The majority also concludes that attributing delays in recording by the register of deeds to lien claimants would lead to absurd and unfair results not contemplated by the Legislature. I agree that the Legislature likely did not contemplate that the register of deeds would fail to timely perform the duties imposed on the register by statute. . . . I cannot accept the majority’s conclusion that the rules of statutory construction permit the tacit understanding that the term “recorded” in the act really means filed. . . .

. . . In any case, the difficulties attendant in determining whether the register is timely performing the duties of the office are not justification for this Court to redefine the commonplace and unambiguous statutory term “recorded.”

Id. at 405-06 (citation omitted).

The Department of Commerce appealed the Central Ceiling decision to the Michigan Supreme Court, which affirmed in a brief opinion: “We AFFIRM the judgment of the Court of Appeals, albeit for different reasons. On the limited facts of this case, we conclude that the liens presented to the Wayne County Register of Deeds were timely recorded.” 683 N.W.2d at 142. The court did not elaborate, and instead went on to note that the Wayne County Register of Deeds likely failed “to perform its statutorily imposed duties regarding the recording of liens”, and issued an order to show cause to address the problem.

That leaves open the question of what was “different” about the reasons for the Supreme Court’s ruling. The Michigan Supreme Court simply stated that the liens presented were timely recorded and did not address the substantial compliance provision. On the other hand, the court of appeals relied on the substantial compliance provision. The inference is that the Supreme

Court did *not* rely on that provision. The subcontractors needed to substantially comply with the Construction Lien Act. They did, but their liens were still not recorded due to the delay by the register of deeds. So even though their substantial compliance meant that their liens were valid, their liens were still not recorded. The Michigan Supreme Court did not address the *recording* issue that was the subject of the dissenting opinion in the court of appeals. Instead, the Supreme Court simply concluded, without explanation, that “the liens presented . . . were timely recorded.” In other words, *proper filing* and *acceptance by the register of deeds* equaled *recording*, in contrast with the Court of Appeals’ holding that proper filing and acceptance constituted substantial compliance. The subcontractors were not protected by their own “substantial compliance” because “substantial compliance” relates to a claimant’s actions in filing a lien, not the register of deed’s (in)action in recording it. Only recording would protect the subcontractors.

The Supreme Court’s ruling in Central Ceiling comports with the mortgage recording statute in the case before the Court. Central Ceiling requires the proper filing of a lien, and acceptance by the register of deeds. The “proper filing” of a lien under the Construction Lien Act in turn requires meeting the statutory requirements. If the lien is not “properly filed,” then it cannot be “accepted” by the register of deeds. See Northern Concrete Pipe, Inc. v. Sinacola Companies—Midwest, Inc., 603 N.W.2d 257, 259-61 (Mich. 1999) (reinstating the ruling of the trial court that a lien was untimely filed when the register of deeds returned the lien twice because the legal description was incomplete, and then accepted the lien when the claimant supplied the missing legal description but did so after the statutory ninety-day period had passed). On the other hand, if the lien is “properly filed,” and “accepted” by the register of deeds, then it

is deemed recorded under Central Ceiling. 683 N.W.2d at 142.

The same sequence of events occurs when recording a mortgage against real estate. Mich. Comp. Laws Ann. § 565.201 contains the technical and legal requirements for a mortgage submitted for recording, and an instrument cannot be received for record absent compliance. The mortgage is “received for record” when the register of deeds determines that a mortgage conforms with the requirements, including tender of the fee. Mich. Comp. Laws Ann. § 565.25 then requires that the register of deeds enter the conforming mortgage into an “entry book” before it is actually entered in the record book and recorded. At that point, upon entry in the entry book,

[t]he instrument **shall be considered as recorded** at the time so noted and shall be notice to all persons . . . of the liens, rights, and interests acquired by or involved in the proceedings. All subsequent owners or encumbrances shall take subject to the perfected liens, rights or interests.

Mich. Comp. Laws Ann. § 565.25(4) (emphasis added). Thus, a properly filed mortgage that is accepted by the register of deeds is considered timely recorded. This is the same result as found by the Central Ceiling court.

However, even though the analytical framework in applying the two statutes is comparable, the analysis cannot be completed in this case without evidence of certain material facts, i.e., when was Interstate’s mortgage received for record by the Oakland County Register of Deeds, and if and when was the mortgage entered by the Register of Deeds in the entry book. In this case, Interstate’s motion omits an essential element of the statutory scheme – review and acceptance of the mortgage for recording by the Register of Deeds. “[A]n instrument . . . shall not be received for record by the register of deeds . . . unless that instrument complies with each of [the statutory] requirements . . .” Id. § 565.201. None of the affidavits submitted by

Interstate included any personal knowledge regarding the mortgage in this case, except Helmer's affidavit. However, that affidavit attested only to the date the mortgage was first delivered to the Register of Deeds. The rest of Helmer's affidavit, the other affidavits, and the deposition transcripts provided by the parties, all address generalities about the various steps taken by the Register of Deeds in processing mortgages but are not probative of whether the Interstate mortgage was received for recording on April 30, 2003 or merely delivered. In order to rule in Interstate's favor, the Court would have to infer that the mortgage was not only presented on April 30, 2003, but was received for recording with all of the statutory requirements met on that date. However, this matter is before the Court under Rule 56. All inferences must be drawn in favor of the non-moving party. See Cox v. Kentucky Dept. of Transportation, 53 F.3d 146, 149-50 (6th Cir. 1995) ("In arriving at a resolution, the court must afford all reasonable inferences, and construe the evidence in the light most favorable to the nonmoving party.") (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). The Court cannot draw such inference but, by the same token, it also cannot infer that the mortgage was somehow deficient and therefore not received for recording when it was delivered on April 30, 2003.²

² Although there is insufficient evidence in the record to determine whether the Interstate mortgage was received for record on April 30, 2003, Helmer's affidavit does state that the recording fee was not paid until a check was drawn on June 17, 2003 and accepted by the Register of Deeds on July 30, 2003. Interstate produced two affidavits attesting that the Register of Deeds will not accept the recording fee until after completing its review of the instrument to be recorded. Although Mich. Comp. Laws Ann. § 600.2567(1)(a) requires that the fee must be paid "when the mortgage is left for record," Interstate argued that the Register of Deeds waived immediate tender due to the high volume of filings. The affidavit provided by the Trustee from the Chief Deputy Register of Deeds did not address the process for tender and acceptance of the recording fee. No other facts or circumstances regarding the payment of the recording fee were presented in the parties' affidavits. The parties did not provide any citation of authority to the Court to enable the Court to rule as a matter of law that the issuance of the check on June 17, 2003 and its tender on July 30, 2003 by themselves must lead to the conclusion that the Interstate mortgage was not received for record until July 30, 2003. The June 17, 2003 date may be

There simply is not enough evidence before the Court to determine if the Interstate mortgage was recorded on April 30, 2003 as claimed by Interstate. Neither party provided the Court with Oakland County's "entry book" that it is required to maintain with Mich. Comp. Laws Ann. § 565.24. There is evidence that the mortgage was delivered to the Register of Deeds on April 30, 2003, but there is a genuine issue of fact as to whether it was received for recording that day. There is evidence that a liber and page number was not assigned to Interstate's mortgage until July 30, 2003, but such date is not the date of recording under Michigan law. The recording statutes make clear that the Register of Deeds must keep an "entry book of mortgages," Mich. Comp. Laws Ann. § 555.24; note the day, hour and minute of receipt of the mortgage in the entry book, Mich. Comp. Laws Ann. § 565.25(1); and the mortgage shall be considered as recorded at the time so noted, Mich. Comp. Laws Ann. § 565.25(4). There are genuine issues of fact with respect to each of these issues that prevent the grant of summary judgment in favor of either the Trustee or Interstate.

In conclusion, the Court finds that there are genuine issues of material fact, and this case must proceed to trial. Therefore, the Court DENIES the Trustee's motion for summary judgment

significant in deciding when Interstate's mortgage was recorded, but the Court is unable to make that determination without further information as to what specifically happened in this case with regard to the recording fee and what the Register of Deeds requires for the payment of fees generally.

and DENIES Interstate's motion for summary judgment. The Court will enter an order consistent with this opinion.

Phillip J. Shefferly
United States Bankruptcy Judge

Dated: July 27, 2005

cc: Jessica B. Allmand
Myers & Allmand, PLLC
8163 Grand River, Suite 400
Brighton, MI 48114

John D. Stoddard
Gold, Lange & Majoros, PC
24901 Northwestern Hwy., Suite 444
Southfield, MI 48075-2223